IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number 01-10412
CLIFFORD L. ELLIS, III	)	
DEBORAH E. ELLIS	)	
	)	
Debtors	)	
	)	FILED
	)	At 10 O'clock & 18 min A.M.
CLIFFORD L. ELLIS, III	)	Date: 9-13-01
DEBORAH E. ELLIS	)	
	)	
Movants,	)	
	)	
V.	)	
	)	
HUDDLE HOUSE, INC.	)	
	)	
Respondent.	)	
	)	

ORDER

By motion, Clifford L. Ellis, III and Deborah E. Ellis ("Debtors") seek approval to assume the franchise agreements and leases of two Huddle House locations, Huddle House Unit 105 ("105") and Huddle House Unit 194 ("194"). The Debtors further seek to reject the lease of a third location, Huddle House Unit 215 ("215"). Huddle House, Inc. ("Huddle House") objects to the severing of the three agreements for the three locations and claims that the documents are all one integrated and related transaction and

therefore, Debtors must assume all or reject all. Alternatively, Huddle House argues that even if the agreements are divisible, the assumption of 105 and 194 agreements and leases should not be allowed because the Debtors fail to meet the requirements of 11 U.S.C. §365(b)[1]. Because the leases and franchise agreements are severable and the requirements of §365 are met, the Debtors' motion to assume the leases and franchise agreements for "105" and "194" is granted.

The facts are as follows. The Debtors entered into a separate franchise agreement, a nonresidential real property lease, a security agreement, and a promissory note with Huddle House for each of the three locations. Additionally for 105 personal property leases (signs, equipment, etc.) were executed. The first set of agreements was executed on November 6, 1998 for 194 which is located in North Augusta, South Carolina. The Debtors signed the agreements for 215, which is located in Augusta, Georgia, on May 5, 1999. On

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[1]11 U.S.C. §365 states in pertinent part:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

August 1, 1999, the Debtors signed the third set of agreements for 105 which is also located in North Augusta, South Carolina. Because the 215 location was not performing well, the Debtors defaulted on the rent due. The Debtors also defaulted on the 194 and 105 rents because of the financial drain from 215. On February 9, 2001, the Debtors filed this Chapter 13 bankruptcy case. The Debtors also had three Chapter 11 cases (one for each location) pending in this Court and dismissed. In re Huddle House 105 (Chapter 11 case No. 00-12491, dismissed 8/20/2001) (Dalis, J.); In re Huddle House 194 (Chapter 11 case No. 00-12492, dismissed 8/20/2001) (Dalis, J.); In re Huddle House 215 (Chapter 11 case No. 00-12490, dismissed 8/20/2001) (Dalis, J.).

Each unit acquisition transaction has several documents involved. The 105 franchise agreement has an initial term from August 1, 1999 to February 28, 2001 and has two additional sixty-month renewal terms which have been exercised by the Debtors resulting in $5,000.00 in renewal fees. The 105 lease and franchise agreement cover land located on Hwy 25 in North Augusta, Aiken County, South Carolina. Rent on unit 105 is calculated as a fixed base rent plus "overage rent" which is based on a percentage of the unit's annual "gross volume of business."

The 194 franchise agreement began on November 6, 1998 and the term is to end on August 31, 2012. The agreement has three additional sixty-month renewal terms. The agreement and the lease

cover premises are located at 110 Edgefield Road, North Augusta, Aiken County, South Carolina. Unlike the base rent on 105, the rent on 194 is based upon a percentage of the "Gross Volume of Business" as set forth in a schedule on the lease. Huddle House invoices rental "based upon the Lessee's estimated monthly Gross Volume of Business."

The 215 agreements were entered into on May 5, 1999. The initial term terminates on August 31, 2004 and has three additional renewal terms of sixty months each. The 215 agreements cover the premises located at 3100 Washington Road, Augusta, Richmond County, Georgia. The rent is calculated by a rent factor based upon the estimated gross volume of business.

All three franchise agreements contain the following cross-default provision, whereby a default occurs if:

> Upon written notice to the Operator, if Operator or any guarantor(s) hereof defaults on any other agreement with Company, or any affiliate or parent corporation of Company, including, without limitation, any franchise agreement, sign lease, equipment lease, or premises lease, and such default is not cured in accordance with the terms of the such other

> agreement. Operator hereby also agrees that any such other agreement may be terminated at the election of Company in the event any default on this Agreement is not cured in accordance with the terms of this Agreement, and that the Company may elect to so terminate any one or more of such agreements while choosing not to terminate other such agreements. The remedies provided hereunder shall be in addition to any other remedies the Company may have regarding such other agreements.

Each franchise agreement contains a severability clause stating that if any part of the agreement is determined invalid, the validity of the any remaining portion of the agreement is not affected.

The Debtors are current in performance under their plan and testified that they were prepared to pay the $5,000.00 renewal fees for unit 105. The Debtors' plan proposes to make post-petition payments directly to Huddle House in the amount of $8,9443.69 for unit 194 and $18,600.00 for unit 105. Any pre-petition arrearage shall be "cured through payments by the Chapter 13 Trustee." The Debtors are making monthly payments in the amount $3200.00 into the

plan. The Debtors testified that the Huddle House arrearage will be paid off in eighteen months. The Debtors also testified that 105 and 194 are grossing $75,000.00 a month.

The first issue addressed is whether the parties intended the agreements of the three units to be one indivisible transaction or whether the three separately executed sets of documents constitute three separate severable transactions. According to the franchise agreements, Georgia law governs the contracts. In determining whether or not the transactions are divisible, the intent of the parties controls. See O.C.G.A. §13-1-8(whether a contract is entire or severable is determined by the intention of the parties); Horne v. Drachman, 280 S.E.2d 338, 342 (Ga. 1981)(issue of severability is "determined by the intent of the parties, as evidenced by the terms of the contract.")

The set of agreements for each location represents separate transactions. The terms of the contracts support this conclusion. First of all, the documents for each location were executed at different times: unit 105 was executed on August 1, 1999, unit 194 was executed on November 6, 1998, and unit 215 was executed on May 5, 1999. The leases contain different termination dates and renewal terms. By their terms, one of the Debtors' agreements could expire while the other two remain operating.

Second, each location is unique. The two leases that the Debtors are seeking to assume are located in a different state, South Carolina, while 215 is located in Georgia.

Furthermore, the Debtor, Mr. Ellis, testified that he was not required to agree to take all three locations or none. The only connection between the locations was that if he agreed to lease and operate 215 then Huddle House would lend him the $30,000.00 needed to obtain 105. This does not show an intent to integrate the transactions. He was not required to take 215 in order to obtain the 105 franchise.

Huddle House also argues that the cross-default provisions evidences an intent to integrate the documents of the three locations. To the extent Huddle House argues that the cross-default provision contained in the 215 franchise agreement prevents the Debtors from assuming the other two leases, §365(e)(1)(A)[2] applies

[2]11 U.S.C. §365(e)(1)(A) states in pertinent part:

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--
(A) the insolvency or financial condition of the debtor at any time before the closing of the case.

and the Debtors are not prevented from assuming 105 and 194 agreements. In the case of In re Plitt Amusement Co. of Washington, 233 B.R. 837 (Bankr. C.D. Cal. 1999), the Chapter 7 trustee sought to reject one of three leases entered by the debtor in connection with the purchase of a theater business from the lessor to operate a motion picture theater at three different locations. Despite the cross-default provisions, the court determined the leases could be separately assumed or rejected and stated that artful drafting will not circumvent the trustee's power under §365 to decide separately whether the operation of each individual theater was beneficial or burdensome to the bankruptcy estate. Plitt, 233 B.R. at 845-846. The cross-default provision in the franchise agreements is the only clause that connect the leases in this case. As in Plitt, such cross-default provisions are not adequate proof of an intent to have one single integrated agreement.

Huddle House also argues that since Huddle House would not enter into the any franchise agreement without its standard default provisions, this shows an intent to integrate the agreements. This argument is not supported by the other circumstances and provisions documenting the transactions. The different termination and renewal terms shows that it was possible for one unit to be operated after the others had expired. The different locations, different dates

of execution, different rent calculations, and lack of evidence to the contrary support the severability of the three transactions.

The second issue to address is what the Debtors must cure. Huddle House argues that because of the cross-default provisions the Debtors must cure the arrearage under the 215 lease before the 194 and 105 leases may be assumed. This argument is without merit. As stated in Plitt;

> [I]t is well-settled that, in the bankruptcy context, cross-default provisions do not integrate otherwise separate transactions or leases. . .The cross-default provision must be disregarded in the bankruptcy law analysis, because they are impermissible restrictions on assumption and assignment. See Sambo's Restaurants, Inc. 24 B.R. at 757-58.
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> Plitt, 233 B.R. at 847.

In In re Sambo's Restaurants, Inc., 24 B.R. 755 (Bankr. C.D. Cal. 1982), the court held that cross-default provisions were unenforceable because §365(c)[3] sets forth the only restrictions on

[3]11 U.S.C. §365(c) states in pertinent part:

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

assumption and assignment and that the cross-default provisions operate as clauses based upon the financial condition of the debtor for which enforcement is prohibited by §365(e)(1)(A). Sambo's, 24 B.R. at 757. The court also held that to require the cure of all leases as a condition to assume one lease would enable the creditor to receive payment beyond the statutory limitation set forth in §502(b)(6)[4]. Id. at 758. In Plitt the court reasons that to uphold

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(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
(B) such party does not consent to such assumption or assignment; or
(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;
(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or
(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

[4]11 U.S.C. §502(b)(6) states in pertinent part:

b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except

cross-default provisions would frustrate the financial rehabilitation of the business which is the goal of bankruptcy and purpose of §365. 233 B.R. at 845-847. I find the reasoning in Plitt and Sambo's Restaurants persuasive. The cross-default provision in 215 is unenforceable. The Debtors must only cure the $39,142.87(including renewal fees) arrearage for 105 and 194.[5]

Huddle House cites the case of Kopel v. Campanile (In re Kopel), 232 B.R. 57 (E.D. N.Y. 1999), for the proposition that the cross-default provisions must be upheld. In Kopel, the court enforced cross-default provisions in an unexpired commercial lease and required the debtor to cure a default under a promissory note. Kopel is distinguishable from the present case. In Kopel both the

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to the extent that--
(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--
(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--
(i) the date of the filing of the petition; and
(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates.

[5]Huddle House also argues that $17,000.00 in attorney's fees must also be cured. However the documents state that the fees must be "reasonable" and Huddle House's counsel has not presented sufficient evidence of what services have been performed and the charge for that service. Reasonable attorneys fees may be a component of an allowed claim.

note and the lease were executed on the same day and were clearly part of one single transaction. The court noted the documents were only nominally separate contracts and that "federal bankruptcy policy is offended where the non-debtor party seeks enforcement of a cross-default provision in an effort to extract priority payments under an unrelated agreement." Kopel, 232 B.R. at 65. The court further found evidence of the unified nature of the transaction and stated "the documentary evidence leads to the inescapable conclusion that the Note and Lease are essential elements of one transaction." Id. at 66. In the case sub judice, I have determined the evidence points to three separate transactions, one for each location. Kopel does not support Huddle House's contention.

The next issue to be resolved is whether the requirements of §365(b) are met. Under §365, three conditions must be met before a lease may be assumed. The Debtors must 1) cure or provide adequate assurance of a prompt cure of the default, 2) compensate or provide adequate assurance of compensation for any actual pecuniary loss from the default, and 3) provide adequate assurance of future performance under the lease. 11 U.S.C. §365. The Debtors plan to make payments directly to Huddle House in the amount of $8,9443.69 for unit 194 and $18,600.00 for unit 105. Any pre-petition arrearage shall be "cured through payments by the Chapter 13 Trustee." The

Debtors are making monthly payments in the amount $3,200.00 into the plan. The Debtors testified that the Huddle House arrearage will be paid off in eighteen months. At the hearing the Chapter 13 trustee announced that the Debtors were current in their payments. Such a plan is adequate assurance of a prompt cure. While Huddle House argues that eighteen month is not prompt, my prior decisions holds that the curing of a prepetition arrearage through the plan is allowed. See e.g. Fleet Finance, Inc. v. Randolph (In re Randolph), 102 B.R. 902, 903 (Bankr. S.D. Ga. 1989)(holding that under §1322(b)(5) payments on pre-petition arrearage for 33 months through the plan deemed reasonable). While §365 requires the cure to be "prompt" and 1322(b)(5)[6] requires the time to be "reasonable", the proposed eighteen month pay off is considerably less than the reasonable time period of thirty-three months allowed in Randolph. What constitutes "promptness" is determined on a case-by-case basis. In re Lawrence 11 B.R. 44, 45 (Bankr. N.D. Ga. 1981); see In re Whitsett, 163 B.R. 752, 755 (E.D. Pa. 1994)(cure allowed over two

[6]11 U.S.C. §1322(b) states in pertinent part:

(b) Subject to subsections (a) and (c) of this section, the plan may--
(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

years considered prompt); In re Coors of North Mississippi, Inc., 27 B.R. 918, 923 (Bankr. N.D. Miss. 1983)(three years considered "prompt" cure under facts of the case). Under the facts of this case, an eighteen month cure period is prompt for §365 purposes.

"Adequate assurance" is not an absolute guaranty but it must be more than the Debtor's mere confidence. Motor Truck and Trailer Co. v. Berkshire Chemical Haulers, Inc. (In re Berkshire Chemical Haulers, Inc.), 20 B.R. 454, 459 (Bankr. D. Mass. 1982). The Debtors testified that 105 and 194 are grossing $75,000.00 per month and, being free of the financial drain of 215, the Debtors will be able to meet their obligations. Additionally, they are current in making plan payments. The Debtors have sufficient disposable income to make the plan payments to the trustee and meet the obligations under the leases and franchise agreements of 105 and 194. Therefore, there is adequate assurance of a prompt cure and future performance.

The final issue to address is whether the lease for 215 may now be rejected. Since the lease and franchise agreement were executed on the same day and are integrated and referenced in the security agreement and pertain to the same location, they are indivisible documents. Since the franchise agreement has been deemed rejected by operation of law, the lease must also be

rejected.

It is therefore ORDERED that the Debtors' motion to assume the franchise agreements and leases of units 105 and 194 and to reject lease of unit 215 is GRANTED.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 12th Day of September, 2001.